STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 17, 2002
v	No. 232037 Kent Circuit Court
EVERETT DEMOND COX, Defendant-Appellant.	LC No. 00-003275-FC

Before: Smolenski, P.J., and Neff and Bandstra, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to commit murder, MCL 750.83, and first-degree criminal sexual conduct, MCL 750.520b. He was sentenced as a habitual offender, fourth, MCL 796.12, to life imprisonment for the assault charge and to a concurrent term of forty to sixty years' imprisonment for the criminal sexual conduct charge. He now appeals by right and we affirm.

I

Defendant first claims that the evidence was insufficient to support the conviction of assault with intent to murder. We disagree.

Our standard of review on appeal is *de novo* and we must view the evidence in a light most favorable to the prosecution in order to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). The elements of assault with intent to commit murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the crime murder. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). The intent to kill may be inferred from any of the facts in evidence. *Id.* After reviewing the record below, we are convinced that there was more than ample evidence to sustain the charge of assault with intent to commit murder.

The victim, a twenty-four old woman, and some friends had spent an evening smoking crack cocaine. There had been a number of forays to purchase more of the drug and on the last one the victim and one of her friends, Brian, met up with defendant on the street. Neither the victim nor Brian had ever met defendant before. Defendant got into the victim's car and sold them one rock of crack which the victim and Brian smoked. The three then drove around

looking for more crack to buy and smoke. They were successful and all three of them smoked the drug.

At some point in the early morning hours, the trio ran out of sources and defendant suggested that there was more crack at his parents' home. The victim drove to the home and defendant convinced her to go with him into the unattached garage behind the house. Brian remained in the car. Once in the garage, defendant exposed his penis, making it clear that he wanted sex. The victim refused and fought with him at which point he threatened to kill her with a chain hanging on the wall and choked her into unconsciousness.[1] After reviving the victim briefly, defendant forced her to the floor where he then forced his penis into her mouth. Brian then knocked on the door, giving the victim the opportunity to escape from the garage.

Brian and the victim ran from defendant and called 911 on her cell phone. The victim testified that she was convinced throughout her ordeal that defendant was trying to kill her and the exhibits introduced at trial showed cuts and bruises on her neck. She testified that at one point defendant told her "you're going to know what death feels like." There was significant corroborating testimony and evidence supporting the victim's version of the events in the garage. Defendant did not testify at trial.

There is no question that the evidence in this case, when viewed in a light most favorable to the prosecution, was sufficient to support the jury's guilty verdict of assault with intent to commit murder.

II

Defendant next complains about testimony concerning his behavior after his arrest on the night of the crime and claims that his attorney was ineffective for failing to immediately object to the testimony. We find no error.

Defendant was arrested as he was leaving his parents' home shortly after the crime. The arresting officer testified that when defendant was placed in the back seat of the police cruiser, he kicked the passenger-side window out or off its track[2]. There was no immediate objection to this testimony, but a short time later after the prosecutor's questioning had moved on to events later in the evening, counsel made a passing reference to the window-kicking testimony as improper "other bad acts."

Later in the trial, another officer testified about a search warrant which had been obtained to obtain a blood sample from defendant for DNA matching purposes. The officer testified that when defendant was taken to the hospital for the blood draw, his behavior was vile and included spitting on the officer and a lab technician. It took four officers and a security guard to restrain

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[1] The victim testified that she lost consciousness twice and there was evidence that at some point in the assault defendant might have used a belt in addition to his hands to strangle the victim.

[2] Just before this testimony, the trial court informed the jury that a citizen has no obligation to cooperate with police or to provide any information.

defendant so blood could be drawn. There was no objection to the testimony until the end of the testimony of the next witness, thirty pages of transcript later.

To the extent that there were objections to the two portions of testimony in question, neither was timely and the trial judge did not rule on either one. Under these circumstances, we must consider the claims of error unpreserved in which case they are forfeited unless defendant can show plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Our review of the record leads us to conclude that no plain error occurred.

As noted, the incident in the police cruiser occurred when defendant was arrested very shortly after the crime and while the victim was on the scene to identify him. Defendant's conduct at the time of arrest was relevant to his state of mind at the time of the offense which was described by the victim as very angry and violent and was therefore admissible. MRE 403. See *People v VanderVliet*, 444 Mich 52, 82-83; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

The testimony concerning defendant's behavior at the hospital during the blood draw for DNA matching purposes occurred about two weeks before trial. The prosecution was seeking DNA evidence to match blood on a belt recovered on the night of the offense which they alleged was used in the assault on the victim.[3] While we question the relevancy of the testimony concerning defendant's behavior during the blood draw, we cannot conclude that any substantial right was affected by its admission. There was no further reference to this testimony after it was given, it was relatively brief and, most importantly, the evidence of defendant's guilt was strong. Contrary to defendant's contention, this case was more than a mere credibility contest between the victim and defendant. The victims' testimony was closely corroborated by physical evidence and testimony of other witnesses. No error requiring reversal occurred.

The failure to object to the testimony did not constitute ineffective assistance of counsel. As noted, the testimony regarding defendant's post-arrest behavior was relevant and admissible, and even if the testimony of his behavior at the hospital was not, it did not affect any substantial right of defendant.

III

Defendant's final allegation of error relates to claimed prosecutorial misconduct in closing argument and rebuttal and ineffective assistance of counsel in failing to object. We find no error.

No objection was made to the prosecutor's closing or rebuttal arguments of which defendant now complains. Therefore, review on appeal is limited to plain error affecting substantial rights. *Carines, supra; People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Our review of the prosecutor's arguments leads to the conclusion that there was no misconduct and that any potential prejudice which might have been occasioned by his remarks

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[3] The expert testimony at trial did provide such a link.

could have been eliminated by a curative instruction had a timely objection been made. The prosecutor asked the jury to follow the law and commented on the evidence, urging the jury to hold defendant responsible for his acts and to find him guilty. Defendant was not deprived of a fair trial by any remark of the prosecutor.

Because there was no error in the prosecutor's argument, the claim of ineffective assistance of counsel must fail since counsel is not required to make futile objections. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Affirmed.

/s/ Michael R. Smolenski
/s/ Janet T. Neff
/s/ Richard A. Bandstra